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BLESSING,
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FREESTONE, *et al.*,
Respondents.,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN PUBLIC WELFARE ASSOCIATION AND THE NATIONAL CHILD SUPPORT ENFORCEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Child Support Enforcement, Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means, Serial 103-30, 103d Cong., 1st Sess. (1993) (statement of David T. Ellwood, Asst. Secretary for Planning and Evaluation, U.S. Dept. of Health and Human Services)..... 19

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Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support, Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong., 2d Sess. (1992) (statement of Martha Barger, Victimized Parent, Wheaton, IL)..... 4

SECONDARY AUTHORITIES

Advance Report on Final Natality Statistics, 1993, Monthly Vital Statistics Report, Vol. 44, No. 3, Sup. (1995)..... 13

Cohen, F., *Handbook on Federal Indian Law*, 241-42 (1982)..... 16

Fluckiger, S., *The Changing Relationship of the Judiciary to the Policy and Administrative Processes of Government: An Overview of Recent Commentary on the Nature, Causes, Consequences, and Proposals for Reform of Contemporary Judicial Encroachment*, Brigham Young L. Rev. 1985, (1985)..... 20

General Accounting Office, *Child Support Enforcement: States and Localities Move to Privatized Services* (1995)..... 20

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General Accounting Office, *Interstate Child Support: Wage Withholding Not Fulfilling Expectations* (1992)..... 9, 16, 19

Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Seventeenth Annual Report to Congress* (for the period ending Sept. 30, 1992) (1993)..... 25

Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Eighteenth Annual Report to Congress (for the period ending Sept. 30, 1993)* (1994)..... 10, 11, 25, 26

Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Child Support Enforcement, Nineteenth Annual Report to Congress, for the Period Ending September 30, 1994* (1995)..... 5, 9, 12, 13, 26

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Bureau, Clearinghouse Review (Jan.1996)..... 10

Roberts, P., *Hot Topic/Cold Reality: Establishing Paternity for Children Receiving Public Assistance*, Clearinghouse Review (May 1995)..... 11

Sorensen, E., The Urban Institute, *Noncustodial Fathers: Can They Afford to Pay More Child Support?* (Feb. 1995)..... 15

U.S. Commission on Interstate Child Support, *Supporting Our Children: A Blueprint for Reform; The U.S. Commission on Interstate Child Support's Report to Congress* (1992)..... 9, 12, 13, 23

U.S. Dept. of Health and Human Services, *Developing Effective Procedures for Pro Se Modification of Child Support Awards* (1991)..... 27

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BRIEF OF THE AMERICAN PUBLIC WELFARE ASSOCIATION AND THE NATIONAL CHILD SUPPORT ENFORCEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Pursuant to Court Rule 37, *amici curiae* respectfully submit this brief in support of Petitioner's request that this Court overturn the Ninth Circuit decision that, by creating a private right of action, would immobilize national child support enforcement programs and harm the children whom these programs serve. Consent to the filing of this brief has been granted by counsel for all parties and letters indicating such consent have been filed with the Clerk of this Court.

The American Public Welfare Association ("APWA") is a nonprofit, bipartisan organization of individuals and State and local agency administrators concerned with government human service programs. APWA's members include all State and many territorial human service agencies, more than 1,200 local and federal agencies, and several thousand individuals who work in or otherwise have an interest in government human service programs. APWA's National Council of State Human Service Administrators represents the interests of State IV-D program directors through its Child Support Enforcement Subcommittee. APWA's mission is to assist State human service directors in developing and implementing sound public welfare policy. As an organization of experts in this field, APWA submits this *amici curiae* brief to expose the practical, real world problems that the Ninth Circuit's decision both ignores and exacerbates.

The National Child Support Enforcement Association ("NCSEA") is a nonprofit association founded in 1952. Its mission is to promote and protect the well-being of children and their families through the effective enforcement of child support obligations. NCSEA's membership of more than 2,400 includes judges, court administrators, private and legal services attorneys, federal policymakers, social workers, child support enforcement caseworkers, family support councils, State and county child support agencies and probation departments, policy "think tanks" and child support advocates. Its membership also includes corporations which supply products and services that these individuals and entities need to ensure that children receive the support they deserve from both parents as efficiently and effectively as possible. NCSEA works with Congress and the federal Office of Child Support Enforcement to ensure passage and implementation of effective child support laws and regulations. It also serves as a training and educational organization for its members, offering training conferences and smaller seminars on a wide range of child support topics.

SUMMARY OF ARGUMENT

In *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995), the Ninth Circuit found that custodial parents could bring a class action suit under 42 U.S.C. § 1983 against the State of Arizona for services received through the State's child support enforcement ("CSE") program, administered under Title IV-D of the Social Security Act ("IV-D").[1] The Ninth Circuit's decision would entitle families receiving child support enforcement services from a State to sue the State for its performance in any phase of the child support enforcement ("CSE") program. This decision usurps a comprehensive oversight scheme that Congress put in place when it designed the program. It also thrusts federal courts into the middle of appropriation decisions made by State legislatures and the day to day minutiae of administering the IV-D program. The Ninth Circuit's decision also creates an unattainable expectation of perfect performance and perfect results by States in every case.

"Child support enforcement" is a deceptively simple phrase for a program that, in reality, calls for execution and repetition of a complex sequence of prerequisite activities, including locating absent parents, establishing paternity, establishing and enforcing child support obligations, and collecting child support payments currently due and back payments (or "arrears"). Like an intricate set-up of dominoes, complete success cannot be achieved unless each and every piece falls correctly into place, allowing the next step to go forward. Yet none of these activities can be performed in a vacuum, but must instead be conducted against a tide of burgeoning social problems (such as increasing numbers

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[1] In 1975, Congress responded to the growing number of parents failing to pay child support by creating the Child Support Enforcement Act in Title IV-D of the Social Security Act, 42 U.S.C. § 651-699. (Public Law 93-647). The 1975 legislation authorized federal matching funds to be used by States to help enforce support obligations of noncustodial parents by accomplishing a series of necessary activities. The program is often called simply "IV-D" in reference to the section number corresponding to its statutory placement in the Social Security Act.

of single parent families), and complexities related to interstate enforcement and the involvement of third parties (such as noncustodial parents and private sector employers unfamiliar with assisting in a public sector program) that make enforcement efforts even more difficult.

The Ninth Circuit decision fails to acknowledge the grim reality that, despite optimum processes and resources, Herculean efforts, and tremendous luck, it can still be impossible to collect child support from an alleged father, for whom only a first name is known, who has moved multiple times, and who, when finally discovered, is in prison with no income, has crossed jurisdictional lines, or has simply quit his job to avoid making payments before he moves again to renew the vicious cycle.[2] It may be equally impossible to collect from a wealthy professional, who, after a divorce, denies paternity, hides assets, moves from State to State for years to avoid paying child support, and owes his children hundreds of thousands of dollars.[3] Sadly, examples such as these are all too common.

The Ninth Circuit decision will only exacerbate the difficulties of collecting child support. Creating a right of action that allows custodial parents to file a private lawsuit against the State whenever a parent alleges that the State has not satisfactorily collected the support that the noncustodial parent owes, thus creating a 100 percent compliance standard, will harm all Title IV-D beneficiaries because the time, effort, and money

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[2] One noncustodial parent's extensive efforts to avoid his child support obligation included quitting a job to avoid a wage withholding order, hiding income, failing to obey 12 consecutive court orders to appear, moving to at least three States, and assuming false identities. He was assisted in these activities by his mother. *Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support, Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) (statement of Martha Barger, Victimized Parent, Wheaton, IL).

[3] Another "deadbeat dad" who has received national press attention recently earned more than $300,000 a year, yet failed to pay about $640,000 in child support while living in a number of States and Canada. Orange County Register, June 3, 1996, at 22.

that States will be forced to divert to defend these actions will–by necessity–be taken from honest efforts to serve the millions of families that currently benefit from this growing program that is designed to force irresponsible parents to provide for their children. These children will suffer from overburdened IV-D programs that will be significantly less capable of serving them. Therefore, this Court should reverse the Ninth Circuit decision.

ARGUMENT

I. EVEN IF A STATE PERFORMS EVERY CHILD SUPPORT ENFORCEMENT ACTIVITY PERFECTLY, ALL THE CHILD SUPPORT DUE IN EVERY CASE MAY NOT BE COLLECTED BECAUSE OF THE REAL WORLD PROBLEMS THAT THE NINTH CIRCUIT IGNORES.

On the surface, getting parents to take responsibility for their own children might seem to be a relatively easy objective. In reality, however, this "easy" objective can prove virtually unattainable. Indeed, notwithstanding Title IV-D's elaborate system of plans, policies and procedures, the irrebuttable fact remains that collections are not always possible, as evidenced by the national collection rate of 18 percent.[4] Why is enforcement so difficult? The most significant reason, and the factor that makes the Ninth Circuit's decision unworkable, is that, at every juncture in this complex and massive program, States run into any number of external variables that are outside their control, yet can drive the outcome and, in some cases, make enforcement impossible.

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[4] Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Child Support Enforcement, Nineteenth Annual Report to Congress, for the Period Ending September 30, 1994*, at 28 (1994) [hereinafter *Nineteenth Annual Report to Congress*].

To understand the number of external variables on which enforcement hinges, it is important to first understand the size and scope of the IV-D program and the complex and involved nature of the child support enforcement process.[5] The Title IV-

[5] The Title IV-D child support process can follow many different paths and involve many different steps, which may approximate the following: (1) first, assuming that the custodial parent decides to turn to government assistance rather than the many other available options, a custodial parent must fill out an application for services. Within 20 days of receiving the application, a child support worker must open a case by establishing a case record. The worker will contact the custodial parent for an intake interview, at which the worker gathers basic data about the custodial parent and child and as much information about the noncustodial parent as possible; (2) if the location of the noncustodial parent is unknown, the worker begins to use the information the custodial parent has given to search the databases available to locate the other parent (such as employment records, motor vehicle records, tax records, and many other locator tools); (3) once the worker has located the noncustodial parent, the worker will initiate paternity establishment proceedings and establish a support order or enforcement proceedings, depending on the stage at which a case enters the system; (4) if the child has no legal father, within 90 days of locating the alleged father, the worker must summon him to court for paternity establishment and child support proceedings. In most States, this requires the State to make personal service of the notice of proceedings on the alleged father. At the hearing, the court may order the mother, alleged father and child to undergo genetic testing before making a paternity determination. If the alleged father fails to appear for the hearing and service was properly made, the court can enter a default judgment of paternity against him and proceed to establish a support order; (5) if paternity has already been established, within 90 days the worker must initiate proceeding to establish a support order, if none exists. This too requires the worker to make service–usually personal–on the noncustodial parent of the hearing to establish a support order. At that hearing the court will use the State child support guidelines to determine the amount of support and enter an order in that amount. If the noncustodial parent fails to appear, the court may enter a default order based on the information it has before it about both parents' financial situations; (6) upon entry of an order, the IV-D agency begins collecting the support and distributing all or part of it to the custodial family; (7) in seeking a support order, the State must also ask the court to order the noncustodial parent to provide group health coverage for the child if it is available; (8) to enforce the order, the worker must first try to implement a wage assignment, so that

D program currently is a massive undertaking that provides support enforcement services to families who receive public assistance,[6] families who do not receive public assistance but apply for services,[7] families that have children in foster care,[8] families that receive medical assistance,[9] and families that reside in other States.[10] State programs may be called upon to establish paternity for children who have no legal father, establish child support orders for children who are not living with both parents, collect the child support ordered by the courts for the custodial family, find assets of the noncustodial parent to satisfy the support obligation if regular support payments cease, distribute the child support collected to the custodial family, modify the

the employer will deduct the child support from the noncustodial parent's paycheck. The success of this activity hinges on how conscientious the employer is about reporting the identities of its employees (both long-term, and in some States, newly-hired) and about deducting the support and sending it to the IV-D agency; (9) any time the noncustodial parent changes jobs, the worker will have to repeat this process, and get the new employer to implement the wage assignment; (10) if the support owed cannot be collected through a wage assignment, the child support worker must find other sources of income using locator tools such as unemployment benefits, workers compensation payments, bank accounts, tax refunds, lottery winnings, and rental receipts; (11) modification of orders, based on reviews that must be conducted every three years, requires new support orders that take into account the current financial situation of both parents; and (12) if the noncustodial parent is out-of-state, different locator tools must be used and difficult jurisdictional issues are raised.

[6] 42 U.S.C. § 654.

[7] IV-D services are available to all applicants without limitation. This means that if a millionaire falls behind in child and spousal support, the former spouse can receive IV-D services, either free or upon payment of an application fee up to $25. 42 U.S.C. § 654(6); U.S. House of Representatives, Ways and Means Comm., *1994 Green Book, Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, 103d Cong., 2d Sess. 459 (1994) [hereinafter the *1994 Green Book*].

[8] 42 U.S.C. § 654.

[9] Id.

[10] Id.

child support orders as the noncustodial families' situations change, and locate noncustodial parents who may not want to be found.

Consequently, any single case can require that the State CSE program perform hundreds of individual actions over the term of the case. Successfully navigating through this maze of activity is no small feat; in addition to balancing a number of concurrent activities, caseworkers must also interact with a number of case participants who have competing priorities.[11] In addition to the case principals–the child, custodial parent, and noncustodial parent–delivery of child support enforcement services may also involve the executive,[12] legislative,[13] and judicial agencies[14] of State and local government (such as tax collection agencies), the courts and district attorneys, and private institutions (such as banks, employers, and credit bureaus).[15]

The following section reveals a mere sample of the most common and frequent problems that Title IV-D programs encounter that make the Ninth Circuit's decision unworkable.

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[11] During its "lifespan, a case could involve dozens of employers, several private attorneys, court staff, financial institutions, welfare eligibility workers, even interested public officials." *Child Support Enforcement: The Federal Role, Hearings Before the Subcomm. on Federal Services, Postal Service, and Civil Service of the Senate Comm. on Government Affairs*, 103d Cong., 2d Sess. (statement of Pat Addison, Program Specialist, Commonwealth of Virginia, Dept. of Social Services, Division of Child Support Enforcement) [hereinafter Statement of Addison].

[12] When child support enforcement activities are handled through an administrative proceeding.

[13] Legislatures make program funding decisions.

[14] When child support enforcement activities are handled through a judicial proceeding.

[15] Federal law calls for States to use several enforcement tools that require interaction with other private and public entities. These include State and federal tax refund offset procedures, unemployment compensation offset procedures, liens against real and personal property for overdue support amounts, State tax refund withholding, reporting overdue support owed to consumer credit bureaus, and requiring bonds or other guarantees to secure overdue payments. *1994 Green Book*, at 469-470.

A. Serving a Growing CSE Caseload.

The CSE caseload increased 180 percent between 1980 and 1992, from 5.4 million to 15.2 million.[16] In fiscal year 1994 the IV-D caseload was composed of 18.6 million cases.[17] In a 1992 study of 136 local child support offices, the U.S. General Accounting Office ("GAO") found that overall caseloads per worker nationwide equal or even exceed 1,000 cases at any one time.[18] None of these of cases can be resolved through a single activity and no two cases are ever identical. Many CSE cases may also remain active for decades, depending on State law and federal case closure rules.[19] A single case may be in the system for many years, until the child reaches the State's age of majority.[20]

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[16] *Child Support Enforcement; Federal Efforts Have Not Kept Pace With Expanding Program, Hearings Before the Subcomm. on Federal Services, Post Office and Civil Service of the Senate Comm. on Governmental Affairs*, 103d Cong., 2d Sess. (1994) (statement of Joseph F. Delfico, Director, Income Security Issues, U.S. General Accounting Office)) [hereinafter Statement of Delfico].

[17] *Nineteenth Annual Report to Congress*, at 27.

[18] General Accounting Office, *Interstate Child Support: Wage Withholding Not Fulfilling Expectations* 54 (1992) [hereinafter *Interstate Child Support*]; *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. 112 (1995) (statement of Wallace Dutkowski, Director of Child Support, Michigan Dept. of Social Services, for the American Public Welfare Association) [hereinafter Statement of Dutkowski].

[19] The age of majority varies by State. Some States may also seek recovery of arrears after the child reaches adulthood. Collection efforts may also continue beyond the legal age of majority if the child is attending college. (It is widely perceived that the regulations on case closure are restrictive and prohibit closing cases that are unworkable).

[20] U.S. Commission on Interstate Child Support, *Supporting Our Children: A Blueprint for Reform; The U.S. Commission on Interstate Child Support's Report to Congress* 159-160 (1992); Statement of Addison.

Today, at least one-third of all American families are headed by single parents.[21] The social trend of single parenthood,[22] not surprisingly, has resulted in alarming growth in the demand for IV-D services. Between 1980 and 1992 non-AFDC cases grew from 15 percent to 43 percent of the caseload.[23] In fact, the non-AFDC caseload now exceeds the ongoing AFDC caseload.[24]

B. Locating Absent Parents.

Federal regulations require States to access all appropriate locate sources within 75 calendar days of determining that location is necessary to take the next appropriate action in a case. To be in substantial compliance with IV-D, the States must satisfy this standard in 75 percent of the cases pursuant to 45 C.F.R. § 303.3. (The 75 percent standard applies to all other substantive areas as well). 45 C.F.R. § 305.20(a)(3)(ii).

Location of absent parents is made difficult by factors such as: (1) a woman's genuine lack of knowledge as to the surname of the alleged father; (2) the custodial parent's inability or unwillingness to provide additional information about the alleged

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[21] Paula Roberts, *New Child Support Data From the Census Bureau*, Clearinghouse Review (Jan. 1996), at 874.

[22] From 1970 to 1992, the number of children living with a divorced parent nearly tripled, while the number living with a never married parent grew nearly elevenfold. *1994 Green Book*, at 459. In 1991, the number of births to unmarried mothers was 1.2 million. Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Eighteenth Annual Report to Congress (for the period ending Sept. 30, 1993)* 3 (1994) [hereinafter *Eighteenth Annual Report to Congress*]. In 1992, 1.2 million divorces were granted in the United States. Id.

[23] Statement of Delfico.

[24] *Child Support Enforcement; Opportunity to Reduce Federal and State Costs, Hearings Before the Subcomm. on Human Resources, House Comm. on Ways and Means*, 104th Cong., 1st Sess. 3 (1995) (statement of Jane L. Ross, Director, Income Security Issues, Health, Education and Human Services Division) [hereinafter Statement of Ross].

father[25] (such as a date of birth or Social Security number that are needed to search locator databases); (3) the significant mobility of Americans; and (4) the conscious and diligent effort on the part of some noncustodial parents to evade responsibility by using fraudulent social security numbers, moving across jurisdictional lines to avoid location, and leaving jobs to avoid garnishment of wages.[26]

C. Establishing Paternity.

The IV-D agency must attempt to establish paternity in all cases in which children have been born out of wedlock. 45 C.F.R. §§ 302.31. The average number of children in the CSE caseload requiring paternity establishment in fiscal year 1993 was 3.5 million.[27]

Establishing paternity is complicated by the following factors: (1) multiple possible fathers often exist, all of whom must be located, served with process, and genetically tested; (2) one of the parties fails to appear for genetic testing; (3) the mother was married to, but not living with, her husband, who is not the father of the child; (4) the mother fails to appear in court as a necessary witness in a default hearing; (5) mothers often do not seek to establish paternity when their babies are born, and it is generally more difficult to establish paternity by the time they apply for AFDC or Medicaid benefits;[28] and (6) the process by which paternity is established vary by State (some States may,

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[25] Often, custodial parents simply cannot obtain accurate information because they are forced to rely on information provided by the noncustodial parents, their family or their friends as to his location.

[26] *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Hearings Before the Subcomm. on Human Resources of the House Ways and Means Committee*, 104th Cong., 1st Sess. (1995) (statement of Marilyn Ray Smith, President, National Child Support Enforcement Association) [hereinafter Statement of Smith].

[27] *Eighteenth Annual Report to Congress*, at 44.

[28] Roberts, Paula, *Hot Topic/Cold Reality: Establishing Paternity for Children Receiving Public Assistance*, Clearinghouse Review, 49-53 (May 1995).

for example, require jury trials to resolve contested paternity cases).

D. Providing Services in Interstate Cases.

The handling of interstate cases is far more difficult and complex than the handling of intrastate cases. Custodial parents in interstate cases are less likely to receive support payments than those in intrastate cases.[29] Approximately 30 percent of the national caseload involves interstate cases, but, as a result of the many barriers to interstate enforcement, interstate collections comprise only 8 percent of total collections.[30]

Interstate case processing requires individuals and agencies in two or more jurisdictions to coordinate a series of activities; communicate detailed information precisely and in a form compatible with the needs of other jurisdictions; and understand and cooperate with the varying policies and procedures that jurisdictions across the country follow.[31]

Such cases may be stalled by: (1) a lack of uniformity in laws (e.g., each state has its own particular laws, rules, procedures, support guidelines, etc.); (2) inconsistent interpretation of laws and orders; (3) a tendency by judges in the noncustodial parent's State to favor the noncustodial parent who is before the court, as opposed to the custodial parent, who is not present; (4) the staleness of information in the petition by the time the hearing is set; and (5) the difficulty of obtaining information from another state to refute an noncustodial parent's defense, due to difficulty in reaching the custodial parent (who may be unable to afford a telephone).

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[29] General Accounting Office, *Interstate Child Support; Mothers Report Receiving Less Support From Out-of-State Fathers*, 3 (1992).

[30] *Nineteenth Annual Report to Congress*, at 35 (data for fiscal year 1994).

[31] *Supporting Our Children: A Blueprint for Reform*, at 3.

E. Serving Teenage Parents.

In 1993 72 percent of all nonmarital births were to mothers under age 20.[32] Cases involving teen parents usually require more services and are more difficult to successfully serve than cases involving older and married or formerly married parents. These cases typically require paternity establishment and paternity may be contested rather than acknowledged.[33] Young parents, many of whom may still be in high school, may not be employed or financially capable of paying child support.[34] Young parents are also less likely to understand the complexity of the child support enforcement program and are therefore less capable of assisting in their cases than older parents.[35]

F. Establishing Support Obligations.

Within 90 days of location, a IV-D agency must establish a support order or complete service of process in support proceedings in at least 75 percent of its cases. 45 C.F.R. §303.4. Like every other child support enforcement activity, this is a high volume task. In fiscal year 1994, for example, the IV-D program established over 1 million support orders.[36]

Circumstances that contribute to the difficulty of establishing support orders include: (1) the noncustodial parent is self-employed and lies about his income; (2) the noncustodial parent declares bankruptcy; and (3) the support guidelines are complex requiring consideration of a number of issues, such as custodial arrangements, costs of child care, any special needs of the child,

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[32] *Advance Report on Final Natality Statistics, 1993*, Monthly Vital Statistics Report, Vol. 44, No. 3, Sup. (1995).

[33] *See generally, Supporting Our Children: A Blueprint for Reform*, at 193-200 (discusses issues specific to teenage parents).

[34] Id.

[35] Id.

[36] *Nineteenth Annual Report to Congress*, at 2.

and the age of the child, and they vary from state to state, complicating interstate cases.[37]

Federal regulations also require IV-D agencies to ask that medical support be included in every child support order. 45 C.F.R. §302.80. State IV-D agencies must also enforce these medical child support orders. Medical support enforcement requires States, in addition to their other duties, to: (1) process referrals from the Medicaid agency; (2) determine whether the noncustodial parent has a health insurance policy or plan that will cover the child; (3) obtain information about the plan to enable the filing of claims; (4) file claims with the insurer (or transfer the information to the Medicaid agency for filing); (5) secure health insurance coverage through a court or administrative order; and (6) recover amounts necessary to reimburse medical assistance payments made by the State on the child's behalf.[38] Enforcement is made difficult by factors such as: (1) noncustodial parents who will not obtain available group health coverage or refuse to enroll their child; (2) noncustodial parents who refuse to provide information identifying the plan and the procedures for filing claims or refuse to allow the custodial parent to file claims, preventing the custodial parent from reimbursing the provider or getting back funds paid to the provider; (3) employers and insurers that fail to provide information concerning the availability of group coverage; (4) employers that fail to deduct an amount sufficient to cover the cost of health insurance premiums; (5) employers that fail to handle enrollment when the noncustodial parent refuses to comply with the support order;[39] and (6) the federal Employment Retirement Income Security Act of 1974 ("ERISA")[40] complicates the process by allowing covered health plans to determine whether a medical child

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[37] *See, e.g.*, Statement of Addison (the age of majority with respect to child support enforcement varies by State).

[38] *1994 Green Book*, at 473-474.

[39] See, General Accounting Office, *Ensuring That Noncustodial Parents Provide Health Insurance Can Save Costs*, 1-2 (1972).

[40] 29 U.S.C. § 1001 et seq.

support order is qualified, triggering the plan's obligation to administer the provision of benefits under the order.[41] Each health plan covered under ERISA may also have its own set of requirements[42] which make mass processing of orders impossible and individual handling of each ERISA case a necessity.

G. Enforcing Support Obligations.

In IV-D cases in which the responsibility for and obligation of support are set, the agency must enforce the order using a wide range of mandated enforcement techniques. 45 C.F.R. § 303.6. While wage withholding may be the most effective tool for enforcement of support orders,[43] efforts to withhold wages are made difficult by circumstances such as: (1) a noncustodial parent who has little or no income due to incarceration, unemployment or disability;[44] (2) difficulties in timely identification of a noncustodial parent's employer, particularly where the noncustodial parent works in an industry such as construction, in which frequent job changes are common; (3) a noncustodial parent working in the underground economy to avoid paying support (and, in many cases, income taxes); (4) the inability of state courts to assert jurisdiction over an noncustodial

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[41] While the Omnibus Budget Reconciliation Act of 1993 (which amended, Section 1902 of the Social Security Act with respect to medical support requirements under Medicaid) addressed the chilling effect of ERISA on medical child support orders, some difficulties remain.

[42] One section of ERISA, found at 29 U.S.C. § 514, preempts State laws and regulations governing health insurance and employee benefit plans including employer self-funded health insurance plans.

[43] B. Paulin, *New Initiatives in Enforcing Support*, Delaware Lawyer, Summer 1993, 47, 48 (1993).

[44] An Urban Institute study found that noncustodial fathers who pay child support have significantly higher incomes than noncustodial fathers who do not pay child support. Between 11 to 25 percent of noncustodial parents had personal incomes below the poverty level (based on the poverty threshold for individuals in 1990). Sorensen, E., The Urban Institute, *Noncustodial Fathers: Can They Afford to Pay More Child Support?* 33-35 (Feb. 1995).

parent on an Indian reservation;[45] and (5) the fact that, because federal employers do not pay into the States' unemployment insurance funds, federal employees (including military employees) generally cannot be located through this mechanism.

The noncustodial parent population also tends to have very unstable employment patterns.[46] A 1992 GAO study on the efficacy of wage withholding indicates that in one quarter of the cases reviewed the noncustodial parent was reported to have left the employer by the time that the child support order was served.[47] More than half of the parents in the cases reviewed turned out to be unemployed.[48] Even where wage withholding was implemented, about half stopped paying because employment with the employer ended.[49] Not surprisingly, noncustodial parents who are self-employed or change employers frequently are very difficult to locate and pursue.

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In summary, even if the IV-D program takes every possible action in a case, an individual plaintiff still may not receive child support payments because of the factors discussed above that stand in the way of child support enforcement and collection.

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[45] Because of the Indian Tribes' status as sovereign nations, the authority of State and local governments and the jurisdiction of State law is limited or nonexistent. Consequently, State IV-D activity is generally constrained with respect to noncustodial parents who reside within the jurisdiction of an Indian Tribe. *See* F. Cohen, *Handbook on Federal Indian Law*, 241-42 (1982).

[46] "[E]very year 59 percent of child support obligors hop from job to job." Statement of Smith, at 71.

[47] *Interstate Child Support*, at 52.

[48] *Interstate Child Support*, at 52.

[49] *Interstate Child Support*, at 53.

II. ALLOWING A PRIVATE RIGHT OF ACTION WILL IMMOBILIZE THE IV-D PROGRAM, THWARTING CURRENT EFFORTS TO IMPROVE THE PROGRAM AND ULTIMATELY HARM, NOT HELP, THE CHILDREN IT SERVES.

A. Additional Costs Will be Imposed on the States.

Allowing the Ninth Circuit decision and rationale to stand would impose crippling costs on States. The potential litigants number in the millions[50] and the number of cases may be exponential because child support enforcement encompasses so many separate activities and players. A private right of action could very well result in separate litigation on each separate activity, in every State and in every county.

Congress lodged power over the IV-D program in the Secretary and required the Secretary to negotiate with States regarding the terms of their agreements with the federal government. Congress and the Secretary have left the States with the power to decide how much money a State will spend on the IV-D program.[51] State legislatures must make funding decisions among hundreds of agencies and programs competing for the States' limited financial resources. It is virtually impossible for State legislatures to accurately budget for programs when the federal courts may order that millions of dollars be spent on staff, equipment and services that were not anticipated or planned.

Multiple lawsuits would place a tremendous burden on the program. Costly litigation diverts a State's limited resources from the mission of the IV-D program to pay the Special

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[50] The number of potential plaintiffs could exceed three million in the Ninth Circuit alone. Petitioner's Petition for Writ of Certiorari, at 17, *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995).

[51] Under the State/federal funding arrangement for CSE, States receive a 66 percent federal match rate plus incentives, based on recovered child support. State and local governments must pay the remaining share of costs. *1994 Green Book*, at 489.

Master's salary, plaintiffs' attorney's fees, and the State's own costs and attorney's fees in defense of the case. This is not overstatement, but a candid reporting of unfortunate but undeniable facts.[52] The financial and personal costs to all beneficiaries would be astronomical. Time, energy, and money would be diverted from the program's mission. More custodial parents would lose because the diversion of focused resources will invariably mean that IV-D agencies will be able to help fewer people. More children will lose because increased actions being taken in a few cases will result in other cases receiving no attention. And, most importantly, there is absolutely no guarantee that any funds will be collected. The Ninth Circuit's decision is illogical, because its "solution" hurts those whom it tries to help.

B. Litigation Will Result in Conflicts Among the Secretary, the Federal Courts, States and Localities.

In addition to satisfying the Secretary, as Congress required, under the Ninth Circuit's decision, State governments will be required to satisfy federal judges if federal courts become involved in the micromanagement of the IV-D program. The result will be that States will not know what the law actually requires of them. They may face the loss of federal AFDC money through audit penalties on the one hand and contempt sanctions on the other.

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[52] The California IV-D agency estimates its costs for the Plaintiff's attorney fees in *Barnes v. Healy*, 980 F.2d 572 (9th Cir. 1993) (the case challenged the handling of the receipt and distribution of child support monies, and, among other things, the lack of notice of support collections to obligees), to be $1.71 million and the postage for mailing notices to obligees, over $1 million. West Virginia's IV-D agency estimates that its costs in connection with *Brinkley v. Hill*, No. 5:88-1502 (S.D. West. Va. __) (post-judgment litigation), which involved just one county, reached at least $600,000 per year (for expenses related to the Federal Master, plaintiff's attorney expenses, and defense).

If, for example, a federal district court issues an injunction and appoints a Special Master to supervise enforcement of the court's orders, the Director of a State's IV-D program will be placed in the impossible position of receiving conflicting directions from the Secretary and from the Special Master. The Director could be torn between either complying with the strict orders of a Special Master (who need not worry about budget constraints or cost-effectiveness), or working with the requirements of the Secretary to whom Congress granted flexibility because of the program's complex nature. On a day to day basis, imposition of a Special Master would require the IV-D staff to take precious time from pursuing support payments to satisfy time consuming requirements of the Special Master (such as compiling compliance data).

The current judicial handling of IV-D cases at the State and local level in some regions provides little reason to expect that federal judicial involvement will cause the enforcement process to run more smoothly. Variations in judicial procedures, judges' varying degrees of knowledge about the program,[53] and court delays at the State and local level have been problematic.[54] In fact, many IV-D professionals have recommended that States use administrative processes exclusively.[55] These fragmented procedures will only become more so when every jurisdiction has its own line of case law. Interstate cases, in particular, will become virtually impossible to track and enforce, as will cases in States where child support enforcement is administered at the county level. Where States have privatized child support

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[53] *Interstate Child Support*, at 59.

[54] *Child Support Enforcement; Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, Serial 103-30, 103d Cong., 1st Sess. (1993) (statement of David T. Ellwood, Asst. Secretary for Planning and Evaluation, U.S. Dept. of Health and Human Services).

[55] Id.

enforcement activities,[56] the initial issue is where true liability would lie. It is likely that suits against these States will lead to a complex web of litigation that draws in the State, the contractors, private employers, and any other players whose compliance is essential to successful enforcement.

C. Child Support Policy Should be Made by the Executive Branch and the Congress, Who Speak for the Will of the People, Rather than the Judicial Branch.

The IV-D program is one of a number of State/federal programs that serve children in need.[57] Government resources are not unlimited, and, if certain welfare reform bills currently pending in Congress become law, States will find that they have significantly less money with which to provide these services. The grim reality is that sound social policy will continue to require identification, evaluation, and implementation of trade-offs. In an environment in which all parties can agree that the need is growing, State and federal programs should decide where scant resources are best spent. The decision of whether services should be expanded, maintained, or cut altogether should be made by the executive branch and by Congress who speak for the will of the people who pay for and benefit from the programs. Turning this role over to the judiciary would surely "remove from the people and their representatives the ability to shape policy."[58]

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[56] As of November 1995, one or more child support services were privatized statewide in 20 states and, at the local office level, 18 states had privatized services. At that time, additional privatization was planned in several states. General Accounting Office, *Child Support Enforcement: States and Localities Move to Privatized Services* 2 (Nov. 1995).

[57] Such programs include Medicaid, school-based health initiatives, the Maternal and Child Health program (Title V of the Social Security Act), and the Special Supplemental Food Program for Women, Infants, and Children (WIC) under section 17 of the Child Nutrition Act of 1966.

[58] S. Fluckiger, *The Changing Relationship of the Judiciary to the Policy and Administrative Processes of Government: An Overview of Recent*

The States are best able to craft public policies that balance the interests of individual applicants against the States' taxpayers' interest in utilizing their resources efficiently. The States are best suited to obtaining the most benefits for a maximum number of people, by determining the scope of services and benefits, establishing eligibility criteria, replenishing the supply of money available for public aid, and establishing legal family relationships for their constituents. Federal judges' decisions are not made in a political process where cost, benefit, and competing claims for money are considered. A Special Master can only substitute his or her judgment concerning the allocation of resources and remedies for that of the State and federal agencies.

The Respondents not only ask the federal judiciary to make social welfare policy for States, they also ask the judiciary to exceed current congressional thinking. Not even the child support enforcement advances that Congress is currently considering can ensure that the States will be able to provide every child support enforcement service possible at all times throughout the life of every case so that every noncustodial parent supports his child.

Commentary on the Nature, Causes, Consequences, and Proposals for Reform of Contemporary Judicial Encroachment, Brigham Young L. Rev. 1985, 671, 742 (1985).

III. CONGRESS DID NOT INTEND A PRIVATE RIGHT OF ACTION WHEN IT ESTABLISHED A CAREFULLY REGULATED PUBLIC PROGRAM WHILE ALSO ALLOWING CUSTODIAL PARENTS TO PURSUE ENFORCEMENT DIRECTLY, RATHER THAN ONLY THROUGH THE STATES.

Congress chose to address the need for child support enforcement by creating a public program that is regulated by a comprehensive remedial scheme, comprised of audit provisions and detailed performance criteria, and carefully monitored by both federal and State government.[59] Congress has amended this scheme several times, making it increasingly detailed with each amendment.[60] In fact, the 1984 amendments to Title IV-D

[59] Although States are primarily responsible for administering Title IV-D, the program remains a state-federal partnership. The federal government sets the federal program standards and policy, evaluates States' performance, offers States technical assistance and training, and in certain instances offers direct assistance to States in locating absent parents and collecting support. State child support enforcement agencies have responsibility for administering the program at State and local levels. The federal government and the States, and in some States, county governments, share the program costs. *1994 Green Book*, at 455. Federal responsibility for program oversight lies with the Office of Child Support Enforcement (OCSE) in the U.S. Department of Health and Human Services.

[60] In 1984, Congress substantially expanded and changed the program through the Child Support Enforcement Amendments of 1984 (Public Law 98-378). The 1984 Amendments emphasized that States are required, among other things, to make IV-D services available to all children without regard to income. The Amendments also mandated, as a condition of receiving federal money, States' enactment of specific new statutes aimed at improving child support enforcement. In 1988, Congress enacted the Family Support Act of 1988 to further improve the program by, among other things, placing greater emphasis on establishing paternity and ensuring the fairness and currency of child support awards. (Public Law 100-485). Pursuant to the Family Support Act, IV-D agencies must review support orders and modify them, if appropriate, every three years. The 1988 Amendments also required States to implement statewide automated tracking and monitoring systems. Recognizing the problems associated with collection of support when the parties reside in different states, the

adopted an internal federal regulatory scheme significantly different from the original audit and penalty provisions which were functionally identical to those which still apply to virtually all welfare entitlement programs. *See* 42 U.S.C. § 603(h) (amended, 1984).

A. Congress Made the Secretary Responsible for Oversight of the IV-D Program.

In recognition that it could not expect States to succeed in collecting support in every single case, Congress, in 1984, statutorily delegated directed authority to the Secretary of the Department of Health and Human Services ("HHS") to define the level of performance required to substantially comply with the federal mandate to operate an effective and efficient IV-D program. 42 U.S.C. § 652. Under the standard developed by the Secretary and administered by the Office of Child Support Enforcement, States must meet the compliance provisions in 75 percent of all their cases. The Ninth Circuit decision can be read to give States no leeway at all; they would all have to meet every requirement in every case or be subject to suit in federal court.

The regulations that HHS enacted added new performance indicators to the IV-D internal enforcement scheme. These new indicators were designed (1) to compel states to achieve both AFDC cost recovery and welfare cost avoidance[61] by nonAFDC collections and (2) to set the minimum cost effectiveness

legislation also established the Commission on Interstate Child Support to recommend improvements in laws and procedures related to enforcing support orders across state lines. Many of the Commission's recommendations reflected state-based initiatives. *See, Supporting Our Children: A Blueprint for Reform*, e.g., at 127 (discusses some States' creation of rebuttable presumption of parentage in certain cases and recommends national adoption).

[61] Section 457 of the Social Security Act (42 U.S.C. 657) provides for cost recovery through the use of support collections made with respect to AFDC recipients to reimburse both the State and federal share of the current assistance payment. Cost avoidance is achieved by eliminating families' need for AFDC assistance through the collection of child support.

standards for state IV-D operations. 45 C.F.R. §§ 305.20 and 305.98. At the same time, the Secretary of HHS developed new program compliance and results audit criteria to define "substantial compliance" as required by the statutory amendments. 42 U.S.C. § 603(h).

For a State to receive federal funding for the IV-D program, the Secretary must approve the State Plan. 45 C.F.R. § 301.10. The State Plan is essentially a contract between the State and federal government upon which the availability of federal funding is predicated. The State Plan must comply with the federal regulations, many of which require States to adopt specific laws designed to improve support collection. The regulations governing the approval of State Plans contemplates a careful review of the Plan by federal regional staff, discussion with the IV-D agency for clarification, and negotiation with the IV-D agency. 45 C.F.R. § 301.13(b). The State Plan must also reflect compliance with minimum organizational and staffing requirements. 45 C.F.R. § 303.20.

If the Secretary is not assured that the State Plan complies with all regulatory requirements, the State may not receive federal funding. In carrying out its enforcement role, the Secretary uses a financial "carrot and stick" approach of incentives and penalties. Incentive payments are made based on the State's child support collections. 42 U.S.C. § 658, 45 C.F.R. §§ 302.55, 304.12. The Secretary may withhold advance funds for a State's failure to submit full and complete reports as federal regulations require. 45 C.F.R. § 301.16. The Secretary audits State programs at least every three years to determine the State's compliance with federal statutes and regulations. 42 U.S.C. § 652 (a)(4), 45 C.F.R. § 305.10.

Federal law prescribes a financial penalty for non-compliance based on a percentage of the State's AFDC federal matching funds. The first failure to substantially comply results in a penalty of one to two percent; the second results in a penalty of two to three percent; and third and subsequent failures result

in a penalty of three to five percent. 45 C.F.R. § 305.100. Comprehensive annual audits are conducted on State programs that are under penalty until the deficiencies are corrected.

Recognizing the inherent complexities of the program, Congress provided that the penalty for a failure to substantially comply may be held in abeyance for up to one year to allow the State to implement a corrective action plan. 45 C.F.R. § 305.99. At the end of the corrective action period, the Secretary conducts a follow-up audit targeted at the areas of program noncompliance. 45 C.F.R. § 305.99(d).

Congress clearly recognized that the social and practical impediments to child support enforcement required that the Secretary be given the flexibility to suspend penalty imposition so that noncomplying States could focus on developing and implementing corrective action plans. Given this recognition, Congress could not have intended to allow individuals to divert the States' attention and limited resources by filing private causes of action under IV-D whenever they chose to do so.

Moreover, the enforcement scheme is not a "dead letter," because the Secretary has taken enforcement actions. For example, in 1992, the Secretary levied one percent penalties against two States.[62] In 1993, the Secretary sent notices to fifteen States informing them that audits of their programs indicated they were not in substantial compliance with federal requirements and imposed a three percent penalty against one State.[63] In 1994, the Secretary issued final reports to seven States indicating that audits showed that they were not in substantial compliance, and imposed a one percent penalty against two States.[64]

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[62] Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Seventeenth Annual Report to Congress* (for the period ending Sept. 30, 1992) 45 (1993).

[63] *Eighteenth Annual Report to Congress*, at 38-39.

[64] Id.

These enforcement activities have also proven to be effective mechanisms for helping States achieve substantial compliance. For example, follow-up audit reports were issued in 1993 to seven States that had been issued notices in prior years, of these, five States had achieved substantial compliance and their penalties were rescinded (the other two were yet to be evaluated).[65] Audit penalties were also rescinded for ten of the fifteen States that were sent notices in 1993 because they had achieved substantial compliance (the remaining four were to be evaluated).[66]

B. Congress Left Intact the Custodial Parent's Rights to Take Direct Action Against the Nonpaying Parent.

The IV-D program is intended to assist custodial parents in collecting support, but it is not the parents' sole remedy. The program was not intended to replace private remedies that are available to persons seeking child support from noncustodial parents. Congress left intact the rights of parties to take court action on their own and still receive IV-D services.[67] Every custodial parent retains the right to hire an attorney or represent themselves in a court action to establish or enforce support.[68] Recognizing the importance of alternatives, many states, including Arizona, have taken steps to improve unrepresented parties' access to court, by standardizing procedures and making them more accessible to the pro se litigant. This may be done through the development of form pleadings, providing

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[65] Id. at 40.

[66] *Nineteenth Annual Report to Congress*, at 15.

[67] "We encourage States to establish a simple pro se process for establishment and modification of orders whereby the parents may essentially represent themselves." 55 FR No. 158, 33414, 33418 (1990).

[68] OCSE has made clear its position that IV-D attorneys do not represent recipients of IV-D services. In the notice of proposed rulemaking issued August 15, 1990, the Federal Office of Child Support Enforcement states that "the IV-D agency does not provide legal services per se. Support rights are assigned to the State in AFDC cases, and even in non-AFDC cases, the traditional attorney-client relationship does not exist." 55 FR 33414 (1990).

instructions and other educational materials and providing the assistance of court personnel.[69] Private agencies also provide collection services with no up front costs to the custodial parents.

It is beyond the IV-D program's scope and capacity to ensure child support collection in all cases at all times. While the IV-D program provides special access to many proven support enforcement techniques, some cases require that more stringent and repetitive enforcement efforts be taken. IV-D agencies are not able to take such actions in all of these cases, given the over 18 million IV-D cases that exist. There is no substitute for self-help. A determined custodial parent with one case may be able to accomplish more than a IV-D worker with thousands of cases.

C. Congress Did Not Intend to Create a Child Support Assurance Program Guaranteeing Custodial Parents 100 Percent Payment.

Title IV-D performs a prosecutorial function that is not intended to guarantee delivery of any specific and finite "benefit" to any specific individual or family. This is not a public benefit program; any economic benefits to individuals or families that IV-D program efforts come from noncustodial parents rather than public funds, and there is no guaranteed monthly benefit that the State pays. Congress' primary purpose in enacting Title IV-D was to reduce the amount paid from the public treasury for welfare.[70] *Wehunt v. Ledbetter*, 875 F.2d 1559 (11th Cir. 1989).

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[69] *See generally*, U.S. Dept. of Health and Human Services, *Developing Effective Procedures for Pro Se Modification of Child Support Awards* (1991).

[70] The IV-D program was originally intended to ease taxpayer burdens by recouping state and federal welfare expenditures necessitated by noncustodial parents' failure to make child support payments. *See* Social Services Amendments of 1974, S. Rep. No. 93-1356, 93d Cong. 2d Sess. 42 (1974).

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The State human service agencies do not oppose the Ninth Circuit decision because they want to quash national child support enforcement efforts. They share the Respondents' desire for successful child support enforcement and devoutly wish that absent parents would take responsibility for their children so that they can grow up healthy, secure in the knowledge that their financial needs will be met and that they are valued by both their parents. Rather, State IV-D human service agencies oppose the Ninth Circuit decision because their extensive experience in constantly striving to improve the IV-D program and effectively increase the chances of recovering support, has taught them what will and will not improve the system. The Ninth Circuit's "answer' to the myriad of problems plaguing the system is really no answer at all.

Congress has already created a comprehensive system of oversight for the child support enforcement program and individuals who are dissatisfied with the services they receive have other avenues of redress. Private rights of action will force federal courts to appropriate for themselves the legislative prerogative to make sensitive funding decisions, involving them in a morass of individual case minutiae as well as broad policy decisions. Even if the courts were inclined to inject themselves into this process, better child support enforcement is not guaranteed because too many variables outside the program control the results. Lawsuits against the States will not make fathers acknowledge paternity without the compulsion of genetic testing or stop running from jurisdiction to jurisdiction and job to job to evade responsibility, or send a check every month to satisfy a child support order. In fact, these suits can only divert attention away from the real problem of parental irresponsibility, drain precious State resources, and because of the flood of litigation that would follow, worsen the child support services most families receive.

Since the inception of the IV-D program in 1975, States' abilities to locate fathers, obtain and enforce child support orders and collect support have grown tremendously.[71] While there are still gains to be achieved in the program, States and Congress are working diligently to achieve them, as evidenced by current proposals in Congress, a recent Executive Order, and State innovations[72] that would alleviate some of the major difficulties States face in enforcing child support.[73] We ask that the Court assist States by allowing them to continue improving the program by concentrating their resources on areas that will realistically improve the IV-D program for all families.

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[71] The number of paternities established though IV-D agencies has more than doubled between 1987 and 1993. Total IV-D collections increased from $3.9 billion in 1987 to an estimated $9.8 billion in 1994. *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Before the Subcomm. on Human Resources of the House Ways and Means Comm.*, 104th Cong. 1st Sess. 112 (1995) (statement of David T. Ellwood, Asst. Secretary for Planning and Evaluation, U.S. Dept. Health and Human Services).

[72] States are developing innovations in child support enforcement through demonstration projects. For example, Florida discussed with HHS the possibility of developing a new system to identify Social Security numbers. Similarly, New England States are developing an interstate compact to facilitate collection in interstate cases. *Support Enforcement; Opportunity to Reduce Federal and State Costs," Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means,* 104th Cong. 1st Sess. (1995) (statement of Mary Jo Bane, Asst. Secretary for Children and Families, U.S. Dept. Health and Human Services).

[73] The President's Executive Order on Child Support (issued Feb. 27, 1995), would implement a new program that will help track nonpaying parents across State lines; challenge all States to follow the lead of the twenty-five States that already require or encourage employers to report new hires, and direct HHS to issue new regulations requiring women who apply for welfare to comply with parental establishment requirements before receiving benefits. In Congress, the Welfare Reform bill (introduced as H.R. 3507 in the House and S. 1795 in the Senate) would, among other things, require the establishment of a State and federal case registry, State and national new hire directories, an expanded federal parent locator service, and administrative enforcement in interstate cases.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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